

# The Remains of the Days of Crisis: The Second Wave of Legislative COVID-19 Measures in Luxembourg

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With the end of the first wave of Covid-19, the state of crisis was ended in June 2020 in Luxembourg. But [its problematic features](#) seem to have remained in the legislative action tackling the second wave. Two main differences appear between the legal approach adopted in March and the current one.

The first difference deals with the legal strategy adopted. The Government had previously taken the lead in March by using the 'state of crisis' mechanism under the Article 32 of the Constitution. On the contrary, the second phase of winter 2020 is dealt with by the Parliament via the standard democratic process. Two laws of 24 June 2020 (n. [7606](#) and [7607](#), the former dealing with physical persons and the latter with sports and cultural gatherings) put an end to the constitutional state of crisis and established the basic structure for the new legal regime regarding the pandemic. The two laws were merged and clarified in the [law n. 7622 of 17 July 2020](#). A second set of measures was adopted to enrich this general framework with stricter measures, in response to the increasing number of infections and deaths. The [law n. 7683 of 29 October 2020](#) established a curfew between 23h00 and 6h00 and limited to 4 the number of people allowed to gather in private. The [law n. 7694 of 25 November 2020](#) closed restaurants and bars as well as gyms, sport clubs and the most part of cultural halls. The [law n. 7733 of 15 December 2020](#) adopted stricter sanitary measures for supermarkets and shops and limited further the opening of cultural sites. The peak of this progressive strengthening was reached with what is called in the medias as the 'second lockdown': according to the [law n. 7738 of 24 December 2020](#) the curfew was set between 21h00 and 6h00, all non-essential commercial shops were closed, no alcohol could be sold on the streets. Nevertheless, a [law of 9 January 2021](#) started to soften the aforementioned measures, allowing for instance gyms, sport clubs and cultural sites (theaters and cinemas) to open again under strict conditions.

The second substantial difference concerns the acceptance of the State's action. While, during the first wave, the public opinion seemed strongly in favor of governmental measures (notably the action of the Health Minister, Paulette Lenert who had gained [significant popularity](#)), the second wave revealed a *crescendo* in the criticism of an action that lacks justification and coherence. We will focus here on three fundamental criticisms, to understand the effects of the remains in the mentality of the authorities of a certain 'state of crisis mindset'.

# 1. Poor Democratic Dialogue

At first, the end of the state of crisis and a recovered democratic process concerning Covid-19 related measures seem the most striking features of Luxembourg legal action concerning this second phase. In this regard, the Green party – part of the governmental coalition – [celebrated](#) the end of the first phase as a victory for democracy, whose structures ‘have resisted to the pandemics’ and cheering for the forthcoming balanced solutions in the new legislative measures between protection of health and respect of human rights. The experience of the latest months should encourage us to challenge a dangerous discourse constructing the rule of law in times of pandemics with binary oppositions – protection of health vs. human rights, need to act promptly vs. burdens of democracy. The constitutional state of crisis vehiculates the very questionable assumption according to which the parliamentary system is unsuitable to face a crisis or emergency. This second phase shows that the democratic engine can and should function in times of emergency and its checks and balances should be seen as tools to achieve a finetuned balance between different interests.

The remains of a certain ‘state of crisis mindset’ are witnessed in the scarce attention that the Government pays to external voices in the elaboration of its legislative proposals, generally ignoring the consultative opinions of the different actors involved. As the *Commission consultative des droits de l’Homme* (CCDH) remarked, the legislature enacted a legislative framework that simply reiterated the bulk of the Grand-Duke’s regulations taken during the state of crisis and, for the rest, was substantially inspired by French law (without even taking into account the remarks that had been made by the French Constitutional Council). The risk with perpetuating the regime established *via* regulation was the *de facto* an extension of the state of crisis, while the problem of simply copying foreign solutions was the absence of serious study of the feasibility of less restrictive measures in the Luxembourg context (CCDH, [opinion 7606, p 3 and 11](#)).

In subsequent action, it was systematically brought up against the Government not to take into account the advice of different actors involved in the legislative process. For instance, in its [opinion on the law of 17th July](#), the Administrative Tribunal lamented that its previous critical remarks on the laws of 24th June had not been taken into account and had to reiterate them. The reality of the democratic reflection and the legitimization of the Covid-laws were strongly questioned.

# 2. Opacity on the Scientific Grounds

Another point that stands out in almost all opinions of the *Commission consultative des droits de l’Homme* is the opacity concerning the rationale behind the decision-making. Since the beginning of the second phase, the CCDH has recalled the importance of systematically disclosing the scientific reasons justifying the restrictive measures, as the establishment of the proportionality of these measures must be based on a solid analysis. Regarding that point, the CCDH regretted that the laws introduced several limits to private gatherings quoting scientific evidence that was

unrelated to the adopted restrictions or simply alleging a generic widespread of the virus ([opinion 7622, p 3](#)). Similarly, the *Conseil d'Etat* repeatedly pointed out that the authors of the law needed to clarify those alleged 'objective criteria' justifying their restrictive action ([opinion on law 7733](#) and [on law 7694](#)). But the Government did not submit detailed results of the large-scale testing, hiding behind data protection, while geographic and age-related statistics would have been possible ([opinion 7634, p 3](#)). This point was raised in different parliamentary questions to the Health Minister who recognized, [in one of her answers](#), the necessity for detailed analysis of those data. Similarly, different consultative bodies pinpointed that the Government has not sufficiently justified whether the different curfew measures were effective at all.

The measures seem much more inspired on adapting the restrictions taken in neighboring countries rather than on a thorough study of the data of the country ([opinion 7683, p 2](#)). For instance, no statistics have been released yet concerning the necessity and effects of the curfew ([opinion 7694, p 4](#)). The CCDH had also linked this necessity of transparency of the public action to the freedom of expression: recalling the position of the Venice Commission, it defended that a public debate, a 'market place of ideas' and a responsible journalism were indeed a necessary tool to face the problems raised by the restrictive measures ([opinion 7606, p 6](#)).

### 3. Lack of Coherence

The State's action was also intensely criticized for not being properly suited to adequately face the pandemic. One main set of critics against the measures concerned their lack of precision: both the [CCDH](#) and the [Conseil d'Etat](#) pointed out several vague and unclear positions that needed to be spelled out for the sake of legal certainty, most notably as they often had criminal law implications. Gradually, the critics became more generalized and addressed the lack of consistency and coherence of the action of the legislature. It is interesting to see that the left-radical party *Déi Lénk* who initially abstained during the vote of Covid-laws (complaining about their [imprecision](#)), progressively felt the need to criticize the attitude of the Government more openly and to vote against the more recent legal measures (just as all the other members of the opposition), qualifying them as '[irrational](#)'.

As regard to the clarity of the measures, some [underlined](#) the excessive number of rules, adopted with short-sighted laws, lacking a long-term strategy or a clear streamlining of the measures. This opaque result created confusion not only among the population but also among the police. The litigation before the administrative judge concerning the sanctions taken on the basis of Covid-19 measures (generally concerning restaurants and bars), revealed several pathologic behaviors of the police. In the majority of the cases accessible to the public, the judge annulled the ministerial decisions as the police agents had applied administrative sanctions that were based on legal measures no longer into force as the new laws foresaw no sanctions in those situations (*Tribunal administratif*, case n. [45257](#)). In other cases, it turned out that the police did not follow the procedural rules for the application of those sanctions (*Tribunal administratif*, case n. [45051](#)) or had even applied a sanction based only on hear-say (phone calls or social medias videos) while

admitting not having verified the said irregularity in situ (*Tribunal administratif*, case n. [45061](#)).

Regarding the impact of the action of the State, various actors questioned the real quest for proportionality of the measures. From the beginning, the Government did not pay sufficient attention to the study of less restrictive possibilities, did not evaluate the real impact of its actions on the field nor adopt measures caring for the special needs of the most vulnerable. The CCDH had, for instance, denounced the radicality of the measures against theaters adopted in November ([opinion 7733](#)), disregarding the importance of cultural rights and of their impact on mental health, while theaters had adopted important measures to respect a strict health protocol.

Concerning the coherence of the action of the Government, several inconsistencies were pointed out in the latest panorama of Covid-19 measures. Some politicians [questioned](#) the real impact of keeping a curfew when all restaurants and bars were closed or [wondered](#) why the canteens of the hospitals closed while those of schools remained open without raising problems. While analyzing the law of 24th December, [the Conseil d'Etat was not at ease](#) concerning different measures. In light of the strict measures decided for, what was the purpose of maintaining a curfew? Was the prohibition to sell alcohol in the streets necessary? Moreover, it strongly questioned the decision to introduce an obligation for every civil servant or person in charge of a public service to denounce a violation of the measures. The structural impact on the criminal system seemed extremely important and is currently limited to “*crimes et délits*” and not contraventions.

## 4. Debunking the ‘State of Crisis Mindset’?

All in all, the recent legislative reaction was strongly criticized for its lack of long-term structure and responsiveness to the concrete evolution of the situation in the country. [MPs regretted](#) that they were voting laws without a clear legislative project or without having the time to evaluate the concrete impact of the law passed the week before. The Government seemed to be ‘navigating by sight’. The lack of serious consideration for the observations and critics coming from different actors, the scarce justification of the scientific grounds of the measures and of their subsequent impact, the lack of coherence of the State’s action behind them lead *Déi Lénk* to consider the response to this second wave as the one of an ‘[authoritarian State](#)’.

The legislative action and reaction to the pandemic revealed important structural problems for the rule of law in Luxembourg. Many of those had already been pointed out during the discussions on the constitutionalizing of the state of crisis. The preoccupations of [Frank Wies](#) regarding the reflex to transpose to the Luxembourgish context French measures without questioning if less intrusive measures were available, found an echo in the current debates. The powerful [denunciation](#) by Véronique Bruck of the state of crisis as a Pandora’s box should be re-read today: the language of urgency or utility replaces a serious democratic reflection on necessary measures, the impact on the most vulnerable becomes a disregarded side-effect.

To conclude, while Luxembourg is preparing its vaccination strategy, we can only hope that the lessons learned from this second wave will show improvements. The remains of the days of crisis (and of the constitutional 'state of crisis mindset') manifested the need for a strong democratic dialogue concerning all Covid-19 related measures, a high degree of transparency concerning the scientific rationale behind those measures and real efforts to adopt a proportionate and coherent action for the situation in Luxembourg without simply replicating what is done elsewhere.

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